

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 DRY CREEK COALITION,

4
5 Petitioner,

6 v.

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8 CLALLAM COUNTY,

9 Respondents,

10
11 And

12 OLYMPIC MEADOWS LAND TRUST and
13 NORTH PACIFIC LAND AND TIMBER,

14
15 Intervenor.

Case No. 08-2-0033

**ORDER ON MOTIONS TO DISMISS
AND TO MODIFY PREHEARING
ORDER**

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17 THIS Matter came before the Board on three motions. The County moved for summary
18 judgment or, in the alternative to dismiss.¹ Intervenor Olympic Meadows Land Trust and
19 North Pacific Land and Timber moved for summary judgment on issues raised in the
20 Petition for Review (PFR), as those issues pertain to the southeast boundary of the Deer
21 Park LAMIRD², as well as to the limits on conditionally allowed uses of Intervenor North
22 Pacific's property located within the Deer Park LAMIRD.³ Dry Creek Coalition (DCC) moved
23 to modify the Prehearing Order.
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25
26 **DISCUSSION**

27 On January 30, 2009, this Board issued a Compliance Order (CO) in the case of *Dry Creek*
28 *Coalition and Futurewise v. Clallam County*, WWGMHB No. 07-2-0018c. In that CO, the
29 Board addressed the County's compliance efforts regarding its LAMIRDs and held, *inter*
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32 ¹ County Motion for Summary Judgment or, in the Alternative, to Dismiss, filed February 13, 2009.

² Limited Areas of More Intensive Rural Development.

³ Intervenor's Motion for Summary Judgment filed on February 17, 2009.

1 *alia*, that the County may properly limit conditional uses in a LAMIRD based upon “type,
2 scale, size, use or intensity” without numerical standards as to those dimensions and that
3 the appropriate inquiry is the character of the existing area “on July 1, 1990” as provided by
4 the Legislature, not “prior to or as of July 1, 1990” as the County provided. The Board found
5 that several LAMIRDs, earlier found to be non-compliant, remain out of compliance with the
6 Growth Management Act (GMA), including Deer Park. However, as to the Deer Park
7 LAMIRD, the Board found Petitioners had not demonstrated that, in relation to the
8 remainder of the LAMIRD, the inclusion of Deer Park Commercial Center was clearly
9 erroneous and not necessary to maintain a Logical Outer Boundary (LOB).
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12 Two dispositive motions are before the Board. Clallam County seeks dismissal of the
13 Petition for Review in Case No. 08-2-0033 in its entirety and Intervenor seeks dismissal of
14 Issues 1, 2, and 7 as they relate to the Deer Park LAMIRD. This Board has previously held
15 that dispositive motions are appropriate where the issues are essentially legal, a limited
16 record is necessary for review, and there are no genuine issues of material fact.⁴ In addition,
17 under the standards applicable to a motion for summary judgment, the motion shall be
18 granted when the pleadings show that there is no genuine issue as to any material fact and
19 the moving party is entitled to judgment as a matter of law.⁵
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22 Here, the issues sought to be dismissed are ones on which the Board has already ruled by
23 Final Decision and Order and in the very recently decided CO in Dry Creek and Futurewise
24 v. Clallam County, Case No. 07-2-0018c. As the Ordinance and Resolution underlying
25 Case No. 07-2-0033 are the same as in the compliance proceeding, there is no additional
26 record required for our review and there are no genuine issues of material fact.
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28 A. Clallam County’s and Intervenor’s Motions for Summary Judgment or Dismissal
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4 Reading et al. v. Thurston County et al. WWGMHB No. 94-2-0019, Order on Dispositive Motions (12/22/94).
5 CR 56(c).

1 The Prehearing Order in this matter set forth eight issues, all of which relate to the County's
2 LAMIRD provisions.⁶ The County argues DCC raised these issues in the compliance
3 proceedings related to Case No. 07-2-0018c. Specifically, the County states the Board's
4 previous holdings in the compliance proceedings in relationship to DCC's challenges based
5 on language relating to "prior to and as of July 1, 1990" (*sic*)⁷ and the "use, scale, size or
6 intensity" of LAMIRDs are controlling. The County points out that DCC has previously
7 asserted the issues before the Board in the present matter are so similar to the issues
8 addressed in Case No. 07-2-0018c that they merited a resetting of the compliance case and
9 consolidation of the cases for later hearing.⁸ Therefore, based on the Board's conclusions
10 in the CO for Case No. 07-2-0018c, the County seeks to dismiss the present appeal in its
11 entirety.⁹
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14 **Issues 1 and 7**

15 Issue 1 as stated in the Prehearing Order provides as follows:

16 Whether for each LAMIRD adopted by Ordinance No. 835 ("Ordinance") and for
17 each designation and zone within those LAMIRDs, the Comprehensive Plan and
18 implementing development regulations identifying for purposes of new
19 development and redevelopment, the allowed and conditionally allowed building
20 size, scale, use and intensity [are] in compliance with RCW 36.70A.020(1) and
21 RCW 36.70A.020(2), RCW 36.70A.040, RCW 36.70A.070 (preamble), RCW
22 36.70A.070(1), RCW 36.70A.070(5), and RCW 36.70A.130?

23 Issue 7 as stated in the Prehearing Order provides as follows:

24 Whether the addition of the terms "where uses of such type, scale, size, or
25 intensity [already] existed" and "similar to the use, scale, size, or intensity as the
26 uses that existed" in the Comprehensive Plan (Rec. 2855-56, 2859, 2874-76,
27 2878-80, 2886-88) and RLC, RNC and Rural Center zones comply with RCW
28 36.70A.020(1) and (2), RCW 36.70A.040, RCW 36.70A.070(preamble), RCW
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30 ⁶ February 9, 2009 Prehearing Order.

31 ⁷ The actual language contained in the County comprehensive plan and development regulations is "prior to or
as of July 1, 1990".

32 ⁸ County Motion at 4.

⁹ The Board notes the County does not set forth specific issues for dismissal. Rather, the County seeks to
dismiss all issues raised by the PFR.

1 36.70A.070(1), RCW 36.70A.070(5), and RCW 36.70A.130 without any further
2 clarification as to what the parameters for use, scale, size, and intensity are in
3 each individual RLC, RNC, and Rural Center zoning district and what criteria
4 must be met to qualify as “similar” potentially including maximum and/or
5 minimum, individual and combined, parameters for buildings, outside storage,
6 parking, and open space: including floor area, stories, height, lot coverage,
7 setbacks, screening, operating hours, noise limits, lighting limits, color limits,
8 pollution and odor limits, sign limits, etc., plus limits on maximum and minimum
9 lot size and number of businesses allowed on a lot, all to give clear direction to
administrators and to the public as to what is required to meet these code
requirements in each individual RLC, RNC, and Rural Center zoning district?

10 Issues 1 and 7 both concern the County’s need to place limits on building size, scale, use
11 and intensity within LAMIRDs and therefore will be addressed together.
12

13 With the CO in Case No. 07-2-0018, the Board found that “the County may properly limit
14 conditional uses in a LAMIRD based upon type, scale, size, use or intensity without
15 adopting numerical standards as to those dimensions.”¹⁰ However, DCC argues that the
16 Board did not address the County’s approach to “type, scale, use or intensity” as it relates to
17 *allowed* uses in the zoning code nor as it is used in the Comprehensive Plan.¹¹ It is true
18 that the Board did not address this aspect of the County’s consideration of “type, scale, use
19 or intensity” as it relates to allowed uses in Ordinance 835. Instead, the focus of the CO
20 was clearly upon the County’s treatment of *conditional* uses. Therefore, Issues 1 and 7 as
21 they apply to allowed uses is not a matter which the Board has previously addressed and
22 those issues are properly before the Board in this appeal. Likewise, briefing for the
23 compliance hearing, the CO and the Order on Dry’s Creek’s motion for reconsideration of
24 the CO all focused on the issue of limits on “size, scale, use and intensity” related to the
25 zoning code, not the Comprehensive Plan. Whether the County’s Comprehensive Plan
26 failed to comply with the GMA by not containing such limits is a matter which the Board has
27 not addressed.
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32 ¹⁰ Id. at 40.

¹¹ DCC Response at 6.

1 Intervenor recognized the allowed use/conditional use distinction and request summary
2 judgment on Issues 1 and 7 only as they pertain to conditionally allowed uses on its land
3 within the Deer Park LAMIRD. Issues 1 and 7 as they relate to conditional uses in the Deer
4 Park LAMIRD, are issues that the Board has fully considered in Case No. 07-2-0018c. As
5 noted above, the Board found that “the County may properly limit conditional uses in a
6 LAMIRD based upon type, scale, size, use or intensity without adopting numerical standards
7 as to those dimensions.”¹² Therefore, it is appropriate that these issues not be raised again
8 as to conditional uses.
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11 In response to Intervenor’s argument, Dry Creek asserts that it would be improper to decide
12 this issue on a limited record.¹³ Dry Creek fails to acknowledge that the record created by
13 the County for the compliance phase of Case No. 07-2-0018c is the record in the present
14 appeal, as both proceedings address the same legislative action. In fact, the County has
15 already submitted the Index of the Record in the present case.¹⁴ Dry Creek asserts that
16 there are additional records the Board would have to review to decide this motion, yet fails
17 to provide them. It argues that it should be allowed an opening brief, a reply brief and oral
18 argument.¹⁵ However, Intervenor’s motion is properly brought and is entitled to
19 consideration. Arguments concerning what non-submitted documents or briefs might show
20 are of no avail.
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23 Intervenor’s motion will be granted.
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25 **Conclusion:** The motion to dismiss Issues 1 and 7 is DENIED, provided that DCC’s
26 challenge in Issue 1 is limited to the County’s treatment of allowed uses. Intervenor’s
27 Motion to limit Issues 1 and 7 as they apply to the southeast boundary of the Deer Park
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31 ¹² Id. at 40.

32 ¹³ DCC Response at 7.

¹⁴ Index of Record , filed January 23, 2009.

¹⁵ Id .

1 LAMIRD as well as to limits on conditionally allowed uses on the property referred to as NP-
2 1 in the Deer Park LAMIRD is GRANTED.

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4 **Issue 2**

5 Issue 2 as stated in the Prehearing Order provides as follows:

6 Whether in the adoption of the Ordinance and Resolution 88-2008 ("Resolution")
7 the County's LAMIRDs with Comprehensive Plan amendments based on
8 development that existed "prior to or as of" or "on or before" July 1, 1990 as
9 opposed to only development that existed "as of July 1, 1990," including in (d)(i)
10 LAMIRDs (Rec. 2854-55, 2856, 2857-58, 2886-87), in rural centers (Rec. 2857-
11 59), the Blyn LAMIRD (Rec. 2873-74), RNC (Rec. 2874-76, 2878-79, 2887), RLC
12 (Rec. 2875-76, 2879-80, 2886, 2888), the Deer Park LAMIRD (Rec. 2886), and
13 the O'Brien LAMIRD (Rec. 2886), comply with RCW 36.70A.070(5)(d)(i) and (v)
14 and with RCW 36.70A.020(1) and (2), RCW 36.70A.040, RCW
36.70A.070(preamble), RCW 36.70A.070(1), RCW 36.70A.070(5), and RCW
36.70A.130?

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16 Intervenor's move for partial summary judgment on Issue 2 as applied to the Deer Park
17 LAMIRD boundary in the vicinity of the property referred to as NP-1.¹⁶ Intervenor's point out
18 that in the CO in Case No. 07-2-0018c the Board held the level of July 1, 1990 development
19 in the Deer Park LAMIRD supported the inclusion of parcel NP-1 within the LAMIRD.¹⁷ The
20 Board recognized that "Easy Street, bordering NP-1 on the west, had full infrastructure in
21 1990 including an 8 inch water main, fire hydrants, and commercial power. We found that
22 this level of development supported the inclusion of NP-1 within the LOB."¹⁸
23

24 The County, for its part, acknowledges that it has assured Dry Creek at the Prehearing
25 Conference that it would amend the phrase "prior to or as of July 1, 1990" to more closely
26 conform to the statutory language of RCW 36.70A.070(5)(d)(v).¹⁹
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31 ¹⁶ Intervenor's Motion at 1-2.

32 ¹⁷ Dry Creek Coalition and Futurewise v. Clallam County, WWGMHB No. 07-2-0018c, CO at 23.

¹⁸ Compliance Order, at 23.

¹⁹ County Motion at 3.

1 DCC argues that while the Board addressed the use of the term “prior to or as of July 1,
2 1990” as it appears in the County’s zoning code, Issue 2 requests a finding of
3 noncompliance for this language where it appears in the County’s Comprehensive Plan.²⁰
4 DCC argues that this issue of noncompliance was not addressed in the FDO in Case No.
5 07-2-0018c because the challenged language was first adopted in the ordinance under
6 review in the instant case - Ordinance 835.²¹ DCC appears to have forgotten that
7 Ordinance 835 represented the steps taken by Clallam County in the compliance
8 proceedings and this ordinance was before the Board at the time it issued the CO. While the
9 issue of non-compliance in relationship to the Comprehensive Plan may not have been
10 explicitly addressed in the CO, DCC overlooks the fact that in its briefing for the compliance
11 hearing it argued that this language “was erroneously applied in the Comprehensive Plan
12 (Title 31 CCC) to various LAMIRDs and land use designations and classifications in
13 LAMIRDs . . . ”²² DCC also chooses to ignore the fact that in the compliance proceeding it
14 specifically argued, as a section heading no less, “The County’s Use of the Term ‘Prior to or
15 as of July 1, 1990’ instead of ‘as of July 1, 1990’ in its comprehensive plan and zoning
16 regulations should be found clearly erroneous.”²³
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20 Thus, this issue was raised by DCC in the compliance proceedings and considered by the
21 Board in Case No. 07-2-0018c. In the CO, the Board specifically found that the County’s
22 use of the phrase “prior to or as of July 1, 1990” was not consistent with RCW
23 36.70A.070(5)(d) and this conclusion was not limited to its use in the County development
24 regulations.²⁴ It is not necessary for the Board to repeat its analysis and conclusions in this
25 case; the County’s use of this language has been found non-compliant. Issue 2 shall be
26 dismissed.
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30 ²⁰ DCC Response, at 5.

31 ²¹ Id.

32 ²² DCC’s Objections to a Finding of Compliance at 2.

²³ Id. at 8.

²⁴ January 30, 2008 Compliance Order, at 11.

1 **Conclusion:** The motion to dismiss Issue 2 is GRANTED.

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3 **Issue 3**

4 Issue 3 as stated in the Prehearing Order provides as follows:

5 Whether in the adoption of the Ordinance and Resolution, the County's LAMIRD
6 zoning with amendments allowing development based on development that
7 existed "prior to or as of July 1, 1990" as opposed to only development that
8 existed "as of July 1, 1990," including CCC 33.15.040, Rural Center (Rec. 2899-
9 2901), CCC 33.14.050, RNC (Rec. 2901-02), and CCC 33.15.060, RLC (Rec.
10 2903-04), comply with RCW 36.70A.020(1) and (2), RCW 36.70A.040, RCW
11 36.70A.070(preamble), RCW 36.70A.070(1), RCW 36.70A.070(5), and RCW
12 36.70A.130?

13 In reply to the County's motion, DCC stated that after it reviewed Issue 3, which asked the
14 Board to find the phrase "prior to or" not in compliance with the GMA for three zoning
15 districts, it has determined the Board has already provided adequate relief in finding non-
16 compliance on this issue in Case No. 07-2-0018c. Accordingly, DCC withdraws Issue 3.

17 **Conclusion:** Issue 3 has been withdrawn by Petitioner DCC

18
19 **Issue 4**

20 Issue 4 as stated in the Prehearing Order provides as follows:

21 Whether the West and East LAMIRDs at Laird's Corner, as amended, fail to
22 comply with RCW 36.70A.070(5) for reasons including failure to "minimize and
23 contain" existing areas that had more intensive development on July 1, 1990?

24
25 In its Objections to a Finding of Compliance filed in Case No. 07-2-0018c, DCC argued:
26 "DCC requests that the West and East LAMIRDs at Laird's Corner be found in continued
27 non-compliance because the County continues to include an excessive amount of outfill in
28 these LAMIRDs in continued violation of the requirements in RCW 36.70A.050(d)(i) that
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1 allows only infill and the requirements in RCW 36.70A.070(d)(iv) to “minimize and contain”
2 existing areas that had more intensive development on July 1, 1990.”²⁵

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4 In its response to the motion for dismissal, DCC argues that it intends to present additional
5 evidence from the compliance proceedings Record and argument on Issue 4 as it relates to
6 the West LAMIRD at Laird’s Corner. However, this very same record was before the Board
7 at the compliance hearing in Case No. 07-2-0018c. The Board has already considered the
8 evidence that DCC proffered on the issue of the boundaries of Laird’s LAMIRD East and
9 West and has issued a Compliance Order regarding this exact issue.²⁶ In addition, DCC’s
10 Motion for Reconsideration of those portions of the CO addressing Laird’s LAMIRD West
11 was denied, again based on a record created in the adoption of the ordinance now under
12 appeal.²⁷ DCC has presented its argument and the record relevant to this LAMIRD and the
13 Board has considered it. The County is already under a Compliance Order with regard to
14 this LAMIRD on the very issue of the LOB.
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17 Although Petitioner asserts that the County did not raise a challenge to Issue 4 in its
18 dispositive motion,²⁸ the County sought the dismissal of this issue (along with all others) on
19 the basis of the Board’s ruling in Case No. 07-2-0018c in that there were no genuine issues
20 of material fact. Issue 4 seeks to challenge the Laird’s LAMIRD on the basis that the
21 County failed to “minimize and contain” existing areas that had more intensive development
22 on July 1, 1990. This is exactly the same argument made by Petitioner - and considered by
23 the Board – in Case No. 07-2-0018c.²⁹ Therefore, dismissal of Issue 4 is within the scope
24 of the County’s motion and this issue is therefore dismissed.
25
26

27 **Conclusion:** The motion to dismiss Issue 4 is GRANTED.
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29 ²⁵ DCC’s Objections to a Finding of Compliance at 3.

30 ²⁶ See, *Dry Creek and Futurewise v Clallam County*, WWGMHB No. 07-2-0018c, Compliance Order, FOF 16-
31 18, COL N-Q (1/3/09).

32 ²⁷ *Dry Creek and Futurewise v Clallam County*, WWGMHB No. 07-2-0018c, Order on Motion for
Reconsideration of Compliance Order, (1/20/09).

²⁸ DCC Response at 5.

²⁹ See, Petitioner’s Opening Brief in case no. 07-2-0018c at 7.

1 **Issue 5**

2 Issue 5 as stated in the Prehearing Order provides as follows:

3 Whether the comprehensive plan and zoning as amended in the RLC, RNC, and
4 Rural Centers fails to comply with RCW 36.70A.020(1) and (2), RCW
5 36.70A.040, RCW 36.70A.070(preamble), RCW 36.70A.070(1), RCW
6 36.70A.070(5), and RCW 36.70A.130?

7 While the County correctly argues that the Board has already ruled on the challenges
8 regarding the “prior to or as of July 1, 1990” language and the issue of “use, scale, size or
9 intensity”, Issue 5 does not explicitly raise either of those issues.
10

11 Instead, DCC correctly points out that Issue 5 is a challenge based on amendments to the
12 comprehensive plan and zoning in RLC, RNC and Rural Centers.³⁰ The County has not
13 demonstrated that this issue has been resolved by the CO in Case No. 07-2-0018c.
14

15 Therefore, Issue 6 will be carried forward to the Hearing on the Merits (HOM).
16

17 **Conclusion:** The motion to dismiss Issue 5 is DENIED.
18

19 **Issue 6**

20 Issue 6 as stated in the Prehearing Order provides as follows:

21 Whether the Comprehensive Plan fails to comply with RCW 36.70A.020(1) and
22 (2), RCW 36.70A.040, RCW 36.70A.070(preamble), RCW 36.70A.070(1), RCW
23 36.70A.070(5), and RCW 36.70A.130 when it states that uses in LAMIRDs
24 “should” instead of “shall” remain similar to the use, scale, size, or intensity of
25 uses existing as of July 1, 1990 (such as at Rec. 2859, 2862, 2879, 2886-88)?

26 With regard to Issue 6, regarding the County’s statement that uses in LAMIRDs “should”
27 instead of “shall” remain similar to the use, scale, size, or intensity of uses existing as of July
28 1, 1990, the County has not presented any argument to demonstrate that this issue has
29 already been addressed by the Board. DCC argues this issue is not related to the FDO and
30 CO in Case No. 07-2-0018c and relates only to amendments to the Comprehensive Plan in
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³⁰ Id.
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1 the challenged ordinance. The Board agrees that this issue has not been previously
2 addressed and Petitioner is entitled to raise it in the present appeal.

3
4 **Conclusion:** The motion to dismiss Issue 6 is DENIED.

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6 **Issue 8**

7 Issue 8 as stated in the Prehearing Order provides as follows:

8 Whether any portion of the Ordinance, Resolution, Comprehensive Plan or
9 Development Regulations found not to comply with the Act in issues 1 to 7 above
10 should also be found invalid under RCW 36.70A.302 for substantial interference
11 with the fulfillment of Goals 1 and 2?

12 The County does not make a specific argument as to why Issue 8 should be dismissed. By
13 implication, if all of the substantive issues were to be dismissed - Issues 1 through 7 - there
14 would be no basis for a finding of invalidity. DCC points out that by raising Issue 8 it is
15 permitted to seek invalidity on any issue in this case where the Board finds
16 noncompliance.³¹ Because the Board has determined not all of the issues in this appeal
17 warrant dismissal, Issue 8 will be considered at the HOM.

18
19 **Conclusion:** The motion to dismiss Issue 8 is DENIED.
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21 B. Petitioner's Motion to Modify the Prehearing Order

22 Petitioner has moved to amend the Prehearing Order to clarify that the Resolution
23 challenged is Resolution 88, 2008 and not Resolution 88-2008.³²
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25 In light of the foregoing, DCC's motion is moot. That clarification pertains only to Issue 2
26 which is dismissed by this order.
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³¹ DCC Response at 6.

³² See, DCC Motion for Change In Prehearing Order, filed February 13, 2009.

1 **ORDER**

2 Based on the foregoing, Issues 2, 3, and 4 as stated in the Prehearing Order are hereby
3 DISMISSED. Issues 1, 5, 6, 7 and 8 will be carried forward to the Hearing on the Merits.
4 Provided, however, Intervenor's Motion to limit Issues 1 and 7 as they apply to the
5 southeast boundary of the Deer Park LAMIRD as well as to limits on conditionally allowed
6 uses on the property referred to as NP-1 in the Deer Park LAMIRD is GRANTED.
7

8 DCC's motion to amend the Prehearing Order is DENIED.
9

10 DATED this 9th day of March, 2009.
11

12
13 _____
James McNamara, Board Member

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15 _____
William Roehl, Board Member

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17 _____
Nina Carter, Board Member*
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20 *Board Member Nina Carter was not available to sign this order.
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23 Pursuant to RCW 36.70A.300 this is a final order of the Board.

24 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
25 mailing of this Order to file a petition for reconsideration. Petitions for
26 reconsideration shall follow the format set out in WAC 242-02-832. The original and
27 three copies of the petition for reconsideration, together with any argument in
28 support thereof, should be filed by mailing, faxing or delivering the document directly
29 to the Board, with a copy to all other parties of record and their representatives.
30 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
31 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
32 filing a petition for judicial review.

1 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
2 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
3 judicial review may be instituted by filing a petition in superior court according to the
4 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
5 Enforcement. The petition for judicial review of this Order shall be filed with the
6 appropriate court and served on the Board, the Office of the Attorney General, and all
7 parties within thirty days after service of the final order, as provided in RCW
8 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
but service on the Board means actual receipt of the document at the Board office
within thirty days after service of the final order.

9 **Service.** This Order was served on you the day it was deposited in the United States
10 mail. RCW 34.05.010(19)

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